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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 937.

HOLDEN BROWN, GEORGE HOUSE, and GEORGE WOLFF,
Petitioners,

vs.

STERLING ALUMINUM PRODUCTS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Eighth Circuit in this case is reported at 365 F. (2d) 651, and is also set forth as Appendix A to the Petition for Writ of Certiorari.

The Opinion of the District Court is reported at 246 F. Supp. 279 and is set forth as an Appendix to this Brief and it also appears in the Record at pages 51-59.

JURISDICTION.

The Act of June 25, 1946, c. 646 (1), 62 Stat. 928 (1), Title 28 USCA, § 1254, is invoked by Petitioners in applying for the writ of certiorari in this case.

Section 301 of the Labor Management Relations Act, 61 Stat. 156, Title 29 USCA, § 185, is invoked by the Petitioners as conferring jurisdiction over their action in the United States District Court for the Eastern District of Missouri. However, the Respondent respectfully suggests that since no labor contract violation, nor any contract right of these plaintiffs is involved, the District Court had no jurisdiction over Petitioners' action, a point discussed in our Argument Point I below.

QUESTIONS PRESENTED.

I. The Supreme Court can never reach the "questions presented" (as set forth by Petitioners) because there is here no breach of contract or infringement of Plaintiffs' contract rights to give the District Court jurisdiction under § 301 of the Labor Management Relations Act, 61 Stat. 156, 29 USCA, § 185.

II. Since the "questions" must arise out of the record and not out of thin air, Petitioners' formulation of them should be revised to read:

1. Did the courts below err in holding that Respondent's closing of the St. Charles plant was a matter entirely outside the ambit of the grievance provisions of the particular labor contract and that, for this reason, among others, the affected employees could not obtain a decree ordering the matter to be processed as a grievance?

2. Did the courts below err in holding that under § 301 the District Court should not fashion a remedy requiring Respondent to conform to the last step of the grievance procedure, which directed only that the parties "diligently and in good faith explore some other method for final disposition" (thus providing only for voluntary composure and not for binding resolution of grievances)?

STATEMENT.

This case was decided by the District Court's sustaining (R. 50; opinion at R. 51, 246 F. Supp. 279, Appendix A to this Brief) the Motion to Dismiss (R. 39) filed by Respondent (herein for clarity, sometimes referred to as "Sterling"). Hence, for present purposes the facts are those properly alleged in the pleadings below.

Sterling operated plants in several states including one at St. Charles, Missouri (R. 5). At St. Charles, Sterling had a labor contract with Local 59, International Molders and Foundry Workers Union, which recognized the Union as the bargaining agent for "employees in the Foundry Department **at the St. Charles plant.**" (Emphasis supplied.) (R. 4-5, 9 ff.)

By giving 60 days' notice, Sterling duly terminated the labor contract at its contemplated expiration on February 28, 1963 (R. 27, 43, 46); and on that date, pursuant to information previously given to its employees and the Union, Sterling closed the St. Charles plant, terminated the employment of all persons who worked there, and moved the operation to Malden, Missouri (R. 2, 47).

The Union is **not** a party to this suit. The plaintiffs herein are three erstwhile employees in the Foundry Department, who were members of the Union and constituted its Shop Committee; one of them, Brown, was Chief Committeeman (R. 4). (In their Complaint, plaintiffs offer to allow other former employees to join as plaintiffs by becoming parties and sharing the expense (R. 4), but no others have joined.)

Plaintiffs allege that they (not the Union) requested Sterling to bargain with them over Sterling's intention to close the plant and to terminate the workers, but that Sterling refused (R. 5). Plaintiffs claim that this refusal

constituted a breach of the grievance provisions[1] of the contract (R. 5-6, R. 15 ff.), which procedure calls for:

> First step: Settlement effort by the employee (or one representative of employees if more than one be involved), two shop committeemen from his shift, the chief committeeman (if needed), meeting with the foreman.
>
> Second step: Further effort by the foregoing, plus the chief committeeman, meeting with the divisional superintendent of the employer or his representative.
>
> Third step: Further effort by the foregoing persons *PLUS* the business representative of the Union meeting with a representative or officer of the Company. "If they are unable to settle the matter, they shall diligently and in good faith explore some other method for the final disposition thereof" (R. 16).

No unfair labor practice charge was ever filed with the NLRB. Moreover, this lawsuit was not filed until two years after the St. Charles plant closed (R. 1). In the meantime, almost 10 months after the plant closing, the Union on its own behalf and on behalf of its members had filed a federal court suit against Sterling, claiming damages on the assertion Sterling had moved its plant, laid off its employees and denied recall privileges to those who had acquired seniority at the St. Charles plant (R. 41 ff). However, on August 26, 1964, the *Union* by stipulation with Sterling dismissed its suit with prejudice (R. 49-50).

The instant Complaint asks that Sterling be ordered to "commence to attempt" a satisfactory settlement of the grievance by bargaining with the plaintiffs (R. 8); and

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[1] Other contract violations are inferentially alleged in the paragraph 5 (a), (c), (d), and (e) of the Complaint (R. 6.), but no review of the dismissal as to them is sought in the Petition.

asks that in the meantime Sterling be ordered to pay back pay and continue wage payments to the plaintiffs during the bargaining (R. 8). By their subsequent motion for partial summary judgment, plaintiffs asked that Sterling be required to post bond for $1,815,000, representing an asserted half of the back wages claimed (R. 34-37).

The District Court, on Respondent's motion, dismissed the Complaint for failure to state a claim upon which relief could be granted (R. 54; 246 F. Supp. 279 at 282, Appendix A to this Brief).

As grounds for his decision, District Judge Regan held that plaintiffs lacked the standing to sue, because whatever rights they were asserting under the contract were not "uniquely personal"; that specific performance would not be granted where the parties in their contract had not agreed on a binding method for finally resolving grievances; that the dispute was not one within the ambit of the grievance clause of the contract, but rather one concerning basic company policy; that the closing of the plant followed termination of plaintiffs' employment, so they could not have a grievance about it; that the Court could not compel Sterling to bargain with plaintiffs about closing of the plant, because the UNION was by law the exclusive collective bargaining agent, and also, obviously, because a refusal to bargain is matter for the National Labor Relations Board and not for the District Court; and that due to *laches* "a fundamental change in the relationship of the parties" had occurred which would make the requested discussion "pointless".

The Court of Appeals below (365 F. 2d 651) affirmed the District Court, holding that the District Court had no jurisdiction under § 301, because plaintiffs were not seeking to enforce a right personal to them and vested in them at the time of suit; and holding further (even if, *arguendo*,

the District Court be assumed to have jurisdiction) that plaintiffs were not entitled to relief because (a) the labor contract does not provide a method for dispute resolution warranting specific enforcement and (b) the grievance procedure set out in the contract "does not cover" the type of dispute (refusal to bargain) involved in this case.

ARGUMENT.

I.

THE DISTRICT COURT HAD NO JURISDICTION UNDER § 301 BECAUSE THE ALLEGED REFUSAL TO BARGAIN IS NOT A CONTRACT VIOLATION AND, FURTHERMORE, COULD NOT CONSTITUTE A BREACH OF CONTRACTUAL DUTY TO THESE PLAINTIFFS TO GIVE THEM THE STANDING TO SUE.

The United States Courts have no jurisdiction over the subject matter of this case, a contention made by Respondent throughout this litigation since its inauguration. It was first raised by Respondent's Motion to Dismiss (R. 39) and was sustained by the decision in the District Court (R. 50-59, 246 F. Supp. 279) and the Court of Appeals (365 F. 2d 651 and the Appendix A to Petition herein, pp. 7-18).

The Petitioners' action was an original suit asking for a decree of specific performance of a **labor contract,** alleging a breach of Plaintiffs' rights thereunder by the employer; and it was brought, purportedly under § 301 Labor Management Relations Act, Title 29, U. S. C. A., § 185, and the National Labor Relations Act, Title 29, U. S. C. A., §§ 158 and 159.

(The last two sections (158, 159) cited by the Petitioners (R. 4) have nothing to do with jurisdiction of the federal courts over original actions. Instead they point the way to a conclusion that what is complained of is at best a matter within the sole and exclusive original jurisdiction of the National Labor Relations Board.)

Section 185 (also referred to by the Courts as § 301) does confer upon the Federal District Courts jurisdiction

over original suits (regardless of citizenship or amount in controversy) for the violation of labor contracts (which the action below was not) when asserted by parties whose contractual rights have been violated (which is not the case here).

Our contentions and these decisions below were unquestionably sound and in no wise conflict with any applicable decision of the Supreme Court or of any Court of Appeals.

Particularly, there is no conflict between the decisions below and the decision of the Supreme Court in *Republic Steel v. Maddox,* 379 U. S. 650, 13 L. ed. 580, 85 S. Ct. 614 (1965).

Republic Steel v. Maddox, supra, was a State Court action for severance pay allegedly due under specific provisions of a labor contract giving rise to uniquely personal rights. The United States Supreme Court in that case denied the employee recovery, not for lack of a contract violation personal to the employee, but because the employee should have utilized the grievance procedure provided in the contract there.

Here the Respondent's plant was permanently closed at the end of business on February 28, 1963 (R. 7, 43) when the contract expired (R. 5, 27). All the employees, including those in the Petitioners' (Foundry) department were terminated at that time and the employer's Foundry operation moved to another part of the state (R. 43-44). These things were done only after timely notice to all employees in the Unit and to their Union (R. 5-6, 43).

The contract here contained no prohibition of such of the employer's conduct as is here complained of. The representation of the Union was limited by the Contract (R. 9) to a unit restricted to the Foundry Department workers at the St. Charles Plant and the Union did not represent Respondent's employees at any other location.

There was no provision in the contract against the employer shutting down, against moving, against contracting out, or for severance pay in any event.

As is apparent from the Record, the closing of the St. Charles Plant occurred at the expiration of the contract.

So the employer was not obligated by the **contract** to continue operation of the Foundry Department after February 28, 1963, at St. Charles or anywhere else. It was not bound by its **contract** to negotiate a new contract with the Union. It was not bound by its **contract** to continue the employment of the workers in the Foundry unit after February 28, 1963.

Whatever duties or obligations rested upon the employer in these respects (to discuss the plans for shutdown, to keep the St. Charles plant in operation after the expiration of the term of the contract, to negotiate a new contract, or to continue the employment at St. Charles or anywhere else of former workers who had been in the unit represented by the Union) would be, arguably, duties or obligations imposed by **statute** and not by **contract.**

The question of "unfair practices" under the statute is not before the Court because, as the Court of Appeals properly held:

> "The National Labor Relations Board has the sole and exclusive jurisdiction to determine whether the Company's actions violated their duties under the Act and the Courts have no original jurisdiction to make such a determination" (365 F. 2d 651, 656, Appendix A to Petitioners' Brief, p. 13).

The Petitioners have cited no decision of the United States Supreme Court that is in conflict with this principle which governs this case.

It is true that where the complained of conduct of the employer constitutes **both** an unfair labor practice **and** a violation of the collective bargaining agreement, the dis-

trict court's original jurisdiction under Section 301 (Title 29, U. S. C. A., § 185), cannot be successfully challenged and the cases noticed by the Court of Appeals in its opinion (365 F. 2d 651, 656, Appendix A to Petition, p. 13) may be cited to support such jurisdiction.

However, the **facts** in the case at bar fail to meet the test of those decisions for, as the District Court and the Court of Appeals observed in this case, to support the jurisdiction over original suits there must be presented "rights secured under a collective bargaining agreement". In those other cases redress was sought for a "breach by the Company that occurred during the term of the Agreement".

Since there is present in this record no question of contract violation, the decisions in the District Court and in the Court of Appeals were not in conflict with *Republic Steel Corp. v. Maddox*, supra.

It is significant also that the Court of Appeals here held that the employees did not have

> "a vested interest in the Company's operation being conducted in St. Charles and therefore under the circumstances the Company may close the St. Charles operation completely and relocate elsewhere as its economic judgment dictates without incurring individual liability to each of its employees." 365 F. 2d 651 at 657; Petition, p. 15.

It follows that the district court did not have jurisdiction under § 301, because:

> ". . . for an individual to bring an action under § 301 he must be seeking to enforce a right that is personal to him and vested in him at the time of the suit. *Humphrey v. Moore*, 375 U. S. 335 (1964) . . . However, whenever the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit as a whole, only the

> Union as the sole representative of that unit would normally have the standing to enforce that right . . . It is the Union alone that has the right to bargain with management on these broad policy issues. *May Department Stores v. N. L. R. B.*, 326 U. S. 376 (1945). Any failure to discuss these matters according to the contract is a violation of the collective rights of the entire unit and not of the personal rights of the individual members." (365 F. 2d 651 at 657; Petition, pp. 14-15.)

Thus, whether the question is one of lack of any contract violation or of lack of a contract duty to these Plaintiffs, the District Court was without jurisdiction, both because there was no breach of contract at all and no contractual duty to these plaintiffs. Indeed the very "grievance" procedure which these plaintiffs seek to enforce requires the presence of the union business representative for the last step—and the union, as we have remarked, is not in this lawsuit.

Therefore, we respectfully submit that the Petition for Certiorari should be denied for lack of federal court jurisdiction over the action below.

II.

PLAINTIFFS ARE NOT ENTITLED TO A DECREE OF SPECIFIC PERFORMANCE BECAUSE:

A. CLOSING AND REMOVAL OF THE PLANT AT ST. CHARLES, AFTER THE EXPIRATION OF THE LABOR AGREEMENT, WERE MATTERS ENTIRELY OUTSIDE THE AMBIT OF THE CONTRACT AND ITS GRIEVANCE PROCEDURE.

As stated above, what the petitioners are seeking is a decree compelling the employer to discuss with them broad policy matter such as an agreement not to move the plant, and the negotiation of a new contract for St. Charles.

Any failure or refusal to discuss such questions might arguably be a violation of the statutory rights of all members alike but certainly not a violation of the personal contractual rights of individual members.

It is clear from a reading of the Grievance Procedure provisions of the contract here that they were designed to cover day-by-day questions of practice such as working conditions, risk of hazards and the like.

It is altogether unlikely that the union and the employer, in establishing the machinery for settling disputes over grievances, intended to delegate to a shop committee on a shift, on the one hand, and a foreman, on the other hand, authority to discuss and agree upon such matters as closing the entire department, terminating all the employees therein, and moving the entire operation to another part of the state.

Yet that is "the first step" in the grievance procedure, which would be handled by the employee (or one representative of the employees if there be more than one involved), two shop committeemen from his shift plus the chief committeeman, if needed, on the one hand, and the foremen on the other (R. 15).

Then, if no settlement is reached, the panel is to be augmented by the "chief committeemen and the divisional superintendent or his representative" (R. 16).

Then "if no settlement is reached, the grievance shall be reduced to writing" and the panel further augmented by the addition of "the business representative designated by the union and a representative or officer of the company" (R. 16).

As the third and last step an augmented panel has the duty further to consider the matter and if they cannot agree "they shall diligently and in good faith explore some other method for the final disposition thereof" (R. 16).

The Court of Appeals properly decided that the union and the employer never intended to submit to such a panel and such procedure the negotiation and decision of broad questions of policy affecting alike all members of the unit involved in the question of closing the plant upon expiration of the contract and establishing the operation at a new location in another part of the state.

As we have pointed out there is no conflict between the Court of Appeals holding on this question and *Republic Steel v. Maddox,* supra, where there was a specific provision of the contract for severance pay for Maddox which he sought to enforce under Section 301, and not as here a broad policy decision to decide only through bargaining between the union and the employer.

In any case it would be the union, and not individuals comprising a committee thereof, that would be entitled to represent all the employees in the unit in a dispute involving closing and moving the plant after the expiration of the contract.

The prerogatives of the union, conferred by its status as sole and exclusive bargaining agent, are not to be lightly ignored. The considerations for respecting the Union's status and prerogatives are set forth in *Republic Steel v. Maddox,* supra, 379 U. S. at 653, and are to be recognized here.

The plea of "abandonment" by the union is not only belated but false. It did not even occur to the Petitioners when they filed their Complaint below (R. 3) and later their Motion for Partial Summary Judgment (R. 34).

The first mention of the union's filing and later dismissing a lawsuit was made in the Respondent's motion pleading res adjudicata (R. 40).

The Petitioners now say the suit by the union against the employer was a "friendly suit", but there are no facts

alleged to support an inference that it was anything but an adversary action.

The circumstance that it was by stipulation dismissed with prejudice to the union is no indication that it had been brought without serious intent.

There is no fact alleged by Petitioners or otherwise shown by this record that the Respondent unfairly procured the dismissal.

The Union's lawsuit was brought Dec. 26, 1963, on the theories advanced by the Second Circuit Court of Appeals in the "first" *Zdanok v. Glidden Co.* opinion (288 F. 2d 99, 2d Cir., decided in 1961), but that opinion was overwhelmed by a veritable typhoon of contrary decisions and by inclement criticism, including a disavowal by its own parent, see the "second" *Zdanok* opinion, 327 F. 2d 944, 957, 2d Cir., decided January 29, 1964. Thus, by August 26, 1964, when the Union's suit was dismissed, it was recognized generally by lawyers that the theories of the first *Zdanok* opinion would not support an action such as the Union had brought.

If other reasons motivated the union in dismissing the suit, they do not appear on the record. If there had been any wrongful conduct of the union or the employer in this case, it stands to reason that the Petitioners would have alleged it in their Complaint which was not filed until six months after the union's suit was dismissed.[2]

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[2] Indeed, Petitioners' attorney, in representing members of another union at Respondent's plant, vigorously alleged wrongful conduct by both their union and Respondent. See *Woody v. Sterling Aluminum Products, Inc.*, 365 F. 2d 448 (certiorari pending, No. 946).

B. THE COURTS BELOW PROPERLY DECLINED TO BE DRAWN INTO INVENTING EQUITABLE REMEDIES WHERE THE PARTIES HAD AGREED NOT TO A BINDING METHOD OF SETTLEMENT BUT ONLY TO EXPLORING MEANS OF FINAL SETTLEMENT.

The Court of Appeals below held that the equity powers of the federal courts should not be used to specifically enforce, under Section 301, a contract that merely requires the parties to discuss their grievances (even assuming *arguendo* that the claimed dispute over closing and removing the plant after the contract has expired, arises out of contract and comes within the ambit of the grievance procedure here.)

Cases are cited (and distinguished) in the Court below, holding that specific enforcement will be decreed (a) to compel arbitration (where the contract provides for arbitration) to finally dispose of a dispute or (b) to compel the payment or other implementation of an arbitration award.

But here no arbitration or other reference to an impartial authority was ever agreed to by the employer. No more than a series of steps for voluntary composure of their differences was provided by the contract in the case at bar.

And no case is cited where a court has "fashioned a remedy" for the mere interlocutory exploration of a means of settling a dispute as the Petitioners demand in the case at bar.

Granted that the union and the employer agreed that they would at sometime in the future "explore some other method for the final disposition" of a grievance; nevertheless, this was at the very best an agreement to ne-

gotiate for an agreement; which is a contradiction in terms and imposes no obligation on the parties thereto. 1 Williston, **Contracts**, 3d ed., § 45; 17 Am. Jur. 2d, **Contracts**, § 26.

Hence we submit that the Court of Appeals rightly ruled, without a shadow of conflict with any decision of the Supreme Court, that the federal courts should not be used to decree merely that discussions be had looking toward a final agreement where no more than a voluntary agreement is provided in the contract as a means for the final determination of disputes. The federal courts are able to avoid being inundated by cases under § 301 only because under the "triad" arbitration decisions[3] most cases are relegated to arbitrators. We doubt that the federal courts, unaided by any administrative agency, want to plunge into quagmire of "good faith bargaining" controversies over contract disputes. Furthermore, in the instant case, which involved company policy rather than a contract grievance, the NLRB was not only available, but was the **only** place where the present complaint could have been heard.

CONCLUSION.

For the foregoing reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL BARTLETT,

WILLIAM STIX,
Counsel for Respondent, Sterling Aluminum Products, Inc.

January .., 1967.

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[3] *United Steelworkers of America v. American Mfg. Co.*, 363 U. S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343 (1960); and companion cases.

Certificate of Service.

State of Missouri, }
City of St. Louis. } ss.

I, Daniel Bartlett, one of the counsel for the Respondent herein, and attorney of record for the Respondent below, being duly sworn, say that on January 26, 1967 I served four copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari, on the Petitioners, as required by the Rules of the Supreme Court of the United States by personally mailing such copies to Jerome J. Duff at his office in Suite 1155, 818 Olive Street, St. Louis, Missouri 63101, Attorney for the Petitioners.

Daniel Bartlett,
Member of the Bar of the United States Supreme Court.